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IN THE SUPREME COURT OF FLORIDA

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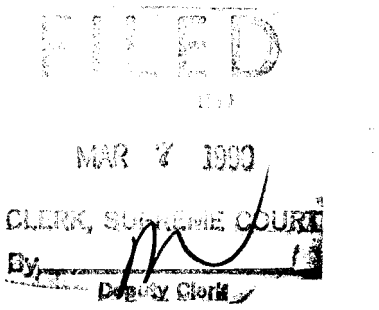

IN RE: ORDER ON PROSECUTION OF CRIMINAL APPEALS BY THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER (PINELLAS COUNTY)

AMENDED BRIEF OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., AS AMICUS CURIAE

ON DISCRETIONARY REVIEW
FROM THE FLORIDA DISTRICT COURT OF APPEAL,
SECOND DISTRICT

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INTRODUCTION

This brief is respectfully submitted by the Florida Public Defender Association, Inc. ("FPDA") as *amicus curiae*. The FPDA is composed of the twenty elected Florida public defenders ("PDs"), who are state constitutional officers, their 800 assistant public defenders, and support staff. The FPDA focuses not only on matters of interest to public defenders, but on the administration of justice as well.

The order under review ("Order") is a dramatic manifestation of a chronic lack of public defender resources and the lack of an effective, uniform, statewide judicial procedure to deal with the resulting excessive caseloads at trial and on appeal. Defender backlogs and withdrawals at trial and on appeal have been dealt with many times by Florida courts, but not on a uniform, efficient, or effective basis statewide.

The issues of concern to the FPDA relate to: 1) the nature of the Order and the magnitude of the problems it leaves unresolved, 2) the evidence in the record of wholesale deprivation of the fundamental rights of indigent appellants, and 3) the impact on the trial and appellate PDs across the state, whose funding continues to decrease as their workloads increase.

Having accepted jurisdiction in these causes, this Court has broad power to review all issues before it. *Savoie* v. *State*, 422 So.2d *308*, 312 (Fla. 1982). This Court also has jurisdiction to

enter extraordinary writs, including habeas corpus, and all writs necessary to the complete exercise of its jurisdiction. Art. V, § 3, Fla. Const.

All twenty public defender offices do trial work. Five of these offices, in addition to their trial responsibilities, handle felony appeals in the district courts and the Supreme Court of Florida. For purposes of this brief, the five offices that handle both trials and felony appeals will be referred to as appellate offices: the fifteen remaining offices will be referred to as trial offices.

The terms "office of the public defender" and "public defender's office" will be abbreviated "PDO". A numerical prefix will be used to designate the PDO in a specific circuit.

STATEMENT OF THE CASE AND FACTS

On March 24, 1989, the 10thCir-PDO wrote a letter informing the Second District Court of Appeal ("2DCA") that due to lack of funding, his appellate backlog was worsening, and his clients were being denied access to the courts. On May 12, 1989, in response to this letter, the 2DCA entered an ***en banc*** administrative Order. ***Order On Prosecution Of Criminal Appeals By The Tenth Judicial Circuit Public Defender,*** ___ So.2d ___ (5/12/89).

The court accepted the statement of the 10thCir-PDO that underfunding had rendered the appellate defender unable to timely process appeals and forced the public defender to choose which

appeals would be pursued according to the severity of the sentence imposed. *Id.* at 2.

The court noted that "[w]hen an attorney representing indigent defendants is required to make choices between the rights of the various defendants, a conflict of interest is inevitably created." *Id.* at 2. According to the court, this conflict either triggered the remedies prescribed in sections 27.53(2),(3), and 925.036(2), Florida Statutes, or authorized the 2DCA to exercise its inherent power to protect the constitutional right of indigent defendants to effective appellate representation. *Id.* at 3.

Concluding that it needed "no further factual information or determination to conclude that [it] must act" (*Id.* at 3), the 2DCA (1) ordered that the 10thCir-PDO not accept, and not be assigned, new appeals except those arising within the tenth circuit, and to withdraw from new appeals to which he may be appointed by a circuit judge or designated by another PD; and (2) ordered that circuit judges shall appoint trial PDs to handle appeals, and to appoint other counsel if the trial PD moves to withdraw and demonstrates his inability to handle the appeals. *Id.* at 5-6. No notice or opportunity to be heard was afforded the affected parties. *Id.* at 12 (Parker, J.).

The Order also directed the 10thCir-PDO to seek reinstatement of certain appeals dismissed by the 2DCA due to earlier delays, in *Order* ***Dismissing Criminal Appeals, 518*** So.2d 403 (Fla. 2d DCA 1988), and to promptly process those appeals once reinstated. *Order* at 6.

Two judges wrote opinions which essentially dissent from the order. Motions for rehearing and/or clarification filed by the 10thCir-PDO and certain counties were denied.

This Court accepted jurisdiction of these matters on discretionary review, and stayed the Order. The cases were consolidated for oral argument.

SUMMARY OF ARGUMENT

The failure to provide adequate representation to indigent appellants violates their constitutional rights and the resultant delays undermine the integrity of the judicial process. The 2DCA commendably attempted to deal with these important issues. However, the attempted solution is not only late, but practically and legally problematic.

As a practical matter, the Order fails to address two major parts of the problem: (1) the existing 1,005 overdue appeals languishing in the 10thCir-PDO, and (2) the several hundred case backlog in that office and other defender offices as a result of the Order. With regard to the only part of the problem addressed by the 2DCA, namely, future appeals from outside the tenth circuit, the court has shifted the initial responsibility from an underfunded public defender to a group of unfunded public defenders.

As a legal matter, the Order constitutes a serious violation of the doctrine of separation of powers, and a misuse of inherent judicial power.

The court violated the constitutional doctrine of separation of powers when it required that trial PDs provide appellate representation. The office of the public defender is a creature of the Florida Constitution, which expressly establishes the legislature's prerogative to define the duties of, and fund, that office. The legislature has implemented the constitutional mandate to define the defenders' duties by enacting Chapter 27 of

the Florida Statutes. That statute expressly provides that the 10thCir-PDO shall handle all felony appeals in the 2DCA. Trial defenders have the statutory right to have the 10thCir-PDO handle their felony appeals.

The legislature also has the constitutional authority to fund the PDOs and has done so by providing for the funding of the appellate staff and expenses of the statutorily-designated appellate defenders. The legislature did not intend to, and, in fact, did not provide funds to trial defenders for briefing or arguing felony appeals. Therefore, by requiring the trial defenders to handle appeals, the 2DCA infringed on the legislature's constitutional power to define the duties of the PDs defenders and to provide resources for the performance of those duties.

The Order also constitutes an improper exercise of inherent judicial power. The 2DCA had the duty, as well as the inherent authority, to remedy the denial of the constitutional rights of access to courts, effective assistance of appellate counsel, due process, and equal protection reflected in the record. The 2DCA's invocation of its inherent authority to address the problem is consistent with action taken by other Florida courts, including this Court. However, that authority was exercised without due regard for its own limitations or those imposed by other constitutional principles.

Inherent judicial authority should be invoked only when the court has exhausted established methods and statutory procedures. The Order directly and unnecessarily conflicts with

established procedures and at least four provisions of the Florida Statutes regarding designation of the appellate defender, circuit judges' discretion to appoint private attorneys, and funding of the PDs.

Moreover, when exercising inherent power, the courts should not operate unitaterally. The Order was entered without affording the affected parties notice or an adequate opportunity to be heard.

Although the counties may have a due process right to be heard before a mandate of this magnitude is issued, a court may appoint private counsel without the participation of the entity responsible by operation of law for paying counsel's fee, whether that entity be the state or the county. Accordingly, the only question for this Court to decide regarding the counties is whether the 2DCA properly determined that they were responsible for compensating the court appointed attorneys. Florida cases and statutes affirm the position taken by the Order in this regard.

The problem of excessive defender caseload faced by the 2DCA was identical to that faced by trial and appellate courts across the state for many years. Its response to that problem would have been acceptable, if it had taken the same approach as this Court and the First District did in similar situations.

This Court should remedy the situation reflected in the record, take judicial notice of the situation beyond the 2DCA, and establish an effective, statewide procedure for dealing with defender trial and appellate overload and lack of resources.

ARGUMENT

I.

THE SECOND DISTRICT IS WITHOUT AUTHORITY TO REQUIRE TRIAL PUBLIC DEFENDERS TO PROVIDE APPELLATE REPRESENTATION, AND REQUIRING SUCH REPRESENTATION VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS BY ENCROACHING UPON THE CONSTITUTIONAL POWER OF THE LEGISLATURE (A) TO DEFINE THE DUTIES OF PUBLIC DEFENDERS AND (B) TO PROVIDE RESOURCES FOR THE PERFORMANCE OF THOSE DUTIES.

Article 11, section 3 of the Florida Constitution provides that no person belonging to one branch of government shall exercise any power belonging to the other branches unless expressly provided in the constitution. The office of the public defender has been created by a constitutional provision which expressly establishes that it is the legislature's prerogative to define the duties of that office. Art. V, § 18, Fla. Const. The legislature has exercised that power in enacting Part II of Chapter 27, Florida Statutes.

The legislature also has the constitutional authority to fund the defenders' offices, Art. 111, §§ 6, 7, and 12, Fla. Const., and has done so by appropriate legislation. § 27.53(4),

Fla. Stat. (1989). ***See also, §§*** 27.51(6) and 27.53(1), Fla. Stat. (1989)

As noted by Judge Schoonover, the 2DCA's Order violates the doctrine of separation of powers by encroaching upon the legislature's constitutional authority to define public defenders' duties and finance the performance of those duties. ***Order*** at 11.

> Creating officers or positions and allocating public funds to support them, are clearly legislative prerogatives that the judiciary has no right to interfere with, absent specific authority from the legislature.

Petition of Florida Bar, 61 So.2d 646, 647 (Fla. 1952).

A. THE SECOND DISTRICT HAS NO AUTHORITY TO EXPAND THE LEGISLATURE'S DEFINITION OF THE DUTIES OF A PUBLIC DEFENDER TO INCLUDE REPRESENTATION IN APPELLATE MATTERS.

The Legislature Has Fulfilled The Constitutional Mandate To Define The Duties Of The Trial And Appellate Defenders.

The office of the public defender is a creature of the Florida Constitution, which provides that public defenders "shall perform duties prescribed by general law." Art. V, § 18, Fla. Const.; ***State ex rel. Smith v. Brummer,*** 443 So.2d 957, 959 (Fla. 1984). Accordingly, only the legislature may define, expand, or restrict the duties of the defenders.

The legislature has implemented the constitutional mandate to define the defenders' duties by enacting Chapter 27 of the Florida Statutes. Section 27.51(4) expressly provides that certain designated public defenders ***shall*** handle all felony appeals.

Thus, the trial defenders within each appellate district

have the right to have the statutorily-designated appellate defender handle all of their felony appeals. The statute imposes no appellate duty on the trial defenders beyond the transmission of the record. The appellate public defender is under a corresponding statutory duty to handle those appeals.[1]

The statute's funding provisions are consistent with the legislative delimitation of defender duties. Section 27.51(6), which provides for the funding of appeals, explicitly states that funds will be appropriated to the statutorily-designated public defenders for the employment of appellate staff and the payment of appellate expenses.[2] The 2DCA has recognized that the statutory framework provides no funding to trial defenders for briefing or arguing felony appeals. In Re *Order* ***On Prosecution Of***

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[1]Section 27.51(4)(b), for example, provides:

> The public defender for a judicial circuit enumerated in this subsection shall, after the record on appeal is transmitted to the appellate court by the office of the public defender which handled the trial and if requested by any public defender within the indicated appellate district, handle all felony appeals to the state and federal courts required of the official making such request: . . . Public defender of the tenth judicial circuit, on behalf of any public defender within the district comprising the Second District Court of Appeal.

[2]Section 27.51(6) provides:

> A sum shall be appropriated to the public defender of each judicial circuit enumerated in subsection (4) for the employment of assistant public defenders and clerical employees and the payment of expenses incurred in cases on appeal.

Criminal Appeals By The Tenth Circuit Public Defender And By Other Public Defenders, 504 So.2d 1349, 1352 (Fla. 2d DCA 1987)("*En Banc I*"). *See also Order* at 7 (Schoonover, J.).

The 2DCA appears to have relied upon § 27.53(3), regarding the appointment of other counsel in the event of PD conflict, to support its mandate that the circuit judges appoint the trial defenders. There is some question whether this statute is intended to apply to appeals at all or to this type of conflict situation.[3] But, assuming *arguendo* that it is applicable, the statute does not give the 2DCA the authority to change trial defender rights or duties. Another obstacle to the use of the statute by the court lies in its plain language; the statute is operative only on the motion of a public defender or a trial

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[3] Section 27.53(3) provides that, if a defender finds a conflict:

> [I]t shall be his duty to move the court to appoint other counsel. The court may appoint either:
>
> (a) One or more members of The Florida Bar, who are in no way affiliated with the public defender, in his capacity as such, or in his private practice, to represent those accused: or
>
> (b) A public defender from another circuit. Such public defender shall be provided office space, utilities, telephone services, and custodial services, as may be necessary for the proper and efficient function of the office, by the county in which the trial is held.
>
> However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict. The court shall advise the appropriate public defender and clerk of court, in writing, when making such appointment and state the conflict prompting the appointment. The appointed attorney shall be compensated as provided in s. 925.036.

court's own motion.

The legislature's intent to limit the appellate duties of trial defenders is clear from the plain language of Chapter 27. Therefore the 2DCA was not free to depart from that intent by requiring trial defenders to handle felony appeals. *See* ***Babb*** v. *Edwards,* 412 So.2d 859, 862 (Fla. 1982).

Florida Courts And Other Jurisdictions Consistently Hold That Courts Cannot Expand Defenders' Statutory Duties.

Florida courts have consistently held that they do not have the authority to expand the PDs' duties beyond those mandated by statute. In *Yacucci* v. *Hershey,* 549 So.2d 782 (Fla. 4th DCA 1989), an acting circuit judge attempted to require a PD to represent indigent parents who had a constitutional right to an attorney in proceedings for termination of parental rights. The judge relied upon his "vested authority", noting that he had appointed the PD in a very narrow range of cases in which appointment was particularly well justified: those cases in which the defender was already representing the parent in related criminal matters. The Fourth District granted a writ of prohibition directing the judge to appoint substitute counsel, stating that the PDO should not be appointed. *See also Office of the Public Defender* v. *Baker,* 371 So.2d 684 (Fla. 4th DCA 1979)(nothing in statute gave the PD the duty to represent a child alleged to be dependent; nothing in statutes gave the circuit court the power to appoint the PD in such cases): *Thompson* v. *State,* 525 So.2d *1011,* 1012 (Fla. 3d DCA 1988) (trial court has no statutory authority to appoint the PD to represent an indigent defendant as co-counsel with privately retained

counsel).

The Florida precedent is consistent with every decision on point known to the undersigned: Courts do not have the authority to expand the PDs' duties and responsibilities beyond those created by statute. *See Maloney v. Bower,* 113 Ill.2d 473, 498 N.E.2d 1102 (Ill. 1986)(a chief judge cannot use his administrative authority to enlarge the duties of the PDO beyond what the legislature has provided); *Vela v. District Court,* 664 P.2d 243 (Colo. 1983)(trial court exceeded its authority in appointing PD in a civil contempt proceeding for failure to pay child support); *State ex rel. Marshall v. Blaeuer,* 709 S.W.2d 111 (Mo. 1986)(court had no authority to compel state to expend public funds by requiring PD to prosecute habeas corpus actions challenging conditions of confinement); *Owen v. Mogavero,* 46 A.D.2d 836, 361 N.Y.S.2d 82, 84 (N.Y. App. Div. 1974)(under PD statute, judge lacked the power and authority to appoint the PD to represent indigents in family court proceedings): *People v. B.N.B. Realty Corp.,* 85 Misc.2d 487, 379 N.Y.S.2d 324 (N.Y. Co. Ct. 1976)(granting PD's motion to be relieved of representation upon holding that statutes did not authorize PD to represent insolvent corporations); *State v. Owens,* 733 P.2d 240 (Wyo. 1987) (municipal judges lacked authority to appoint PDs to represent defendants charged with violations of city ordinances as such violations were not "serious crimes'' within meaning of PD Act).

B. THE SECOND DISTRICT HAS NO AUTHORITY TO REQUIRE APPOINTMENT OF A TRIAL PUBLIC DEFENDER IN APPELLATE MATTERS BECAUSE THIS INTERFERES WITH THE LEGISLATURE'S POWER TO FUND THE PUBLIC DEFENDER.

In addition to prescribing duties, the legislature has the

responsibility for funding the constitutional office of the public defender. Art. 111, §§ 6, 7, and 12, Fla. Const. See *also* §§ 27.51(6) and 27.53(1), Fla. Stat. (indicating that the legislature will appropriate funds for the PD's payment of salaries and expenses). The annual appropriations act determines the number of positions and dollars which are allocated to each PD's office.

The legislature has provided for the funding of felony appeals in section 27.51(6), Florida Statutes, which explicitly states that funds will be appropriated to the statutorily-designated PDs for the employment of appellate staff and the payment of appellate expenses. The legislature did not intend to, and, in fact, did not provide funds to trial defenders for briefing or arguing felony appeals.

In section 27.53(4), Florida Statutes, the legislature has stated that the "appropriations for the offices of public defender shall be determined by a funding formula and such other factors as may be deemed appropriate in a manner to be determined by this subsection and any subsequent appropriations act." The funding formula which the FPDA has developed pursuant to section 27.53(4), and which has been utilized by the legislature for various purposes, is based solely upon the statutory duties expressly imposed by section 27.51. Therefore, the trial PDOs have not been funded by the legislature to represent indigents in appellate proceedings. See *En Banc I* at 1352.

Florida's PDs have not been adequately funded to perform even their statutory duties, and have historically had serious

problems doing so.[4] Allowing courts to mandate expanded representation would adversely affect the PDs' already limited ability to perform those duties.[5]

Thus, the 2DCA's Order violates the doctrine of separation of powers by infringing on the legislature's constitutional functions, which are manifested in the enactment of Part II of Chapter 27, Florida Statutes.

II.

THE SECOND DISTRICT'S ORDER CONSTITUTES AN IMPROPER EXERCISE OF INHERENT JUDICIAL POWER BECAUSE IT UNNECESSARILY CONFLICTS WITH ESTABLISHED METHODS AND STATUTORY PROCEDURES, AND THE COURT ACTED UNILATERALLY IN ITS PROMULGATION.

The FPDA agrees with Judge Parker that the failure to provide adequate representation to indigent defendants is of the utmost importance and that the method adopted by the Order is

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[4] See Argument III below.

[5] Were the courts free to require PD representation in areas in which the Florida Statutes authorize the appointment of counsel for insolvent persons, the defenders' offices throughout the state would be unable, due to funding limitations, to function with even minimal effectiveness. The following sections of the Florida Statutes either explicitly or implicitly authorize such appointment of counsel: *§§ 39.406, .415* (dependent children); §§ 39.438, .447 (children in need of services); *§§ 39.465, .474* (termination of parental rights); §§ 384.27(4)(c), .28(3)(c), .28(4) (sexually transmitted diseases); §§ 392.55(4)(c), .56(3)(c), .68 (tuberculosis); § 393.12(2)(d) (developmental disabilities); § 396.102(9), (alcoholism): § 397.052(6) (drug dependency); § 415.105(3)(a) (protective services for the aged): §§ 744.331(4), .464(3) (mental and physical incapacity).

problematic. *Order* at 13. The 2DCA deserves commendation for its attempt to deal with this important issue, which is related to the integrity of the judicial process as well as the constitutional rights of indigent defendants. However, the attempted solution and the means by which it was adopted are both practically and legally problematic.

As a practical matter, the Order fails to address two major parts of the problem: 1) the existing problem of the 1,005 overdue appeals languishing in the 10thCir-PDO (*Order* at 1, 5), and 2) the newly occurring backlog in the 10thCir-PDO and other offices. The new backlog continues to grow because no work has been done on any defender appeal in the 2DCA, except in the 10thCir-PDO, since May, 1989. That new backlog now consists of several hundred cases. With regard to the part of the problem addressed by the 2DCA, *i.e.*, future appeals from outside the tenth circuit, the court has shifted the initial responsibility from an underfunded PDO to a group of unfunded PDOs.

As a legal matter, the Order constitutes a misuse of the inherent judicial power because it unnecessarily conflicts with legislatively created duties and prerogatives by: imposing new duties on trial PDs, limiting the discretion of circuit courts to appoint private attorneys, and possibly by imposing extraordinary costs on the counties. It does all this without having given the affected parties notice or an opportunity to be heard. As stated above, the improper exercise of inherent power by the 2DCA also constitutes a serious violation of the separation of powers doctrine.

A. INHERENT JUDICIAL POWER MAY PROPERLY BE EXERCISED TO ENSURE CONTROL OF THE JUDICIAL PROCESS AND THE FUNDAMENTAL RIGHTS TO ACCESS TO COURTS AND COUNSEL.

The FPDA agrees that the 2DCA had the inherent judicial power to provide for adequate representation of indigent criminal defendants. *Order* at 3, 12. It was correct, even essential, that the court address the problem presented by the failure of the PD to effectively prosecute the pending appeals of his clients. In fact, the court should have acted long before the problem reached its current magnitude.

The problem of excessive appellate caseload in the 10thCir-PDO is of long standing. For four years, the 10thCir-PDO made repeated requests to withdraw as appellate counsel, citing its inability to cope with an ever-growing backlog of appeals. These requests were denied, and the backlog grew to over 1,000 cases. These appeals, as well as many which have been disposed of, have all been the subject of substantial delays.

The Order concludes that "[T]he overall backlog of criminal appeals has not been alleviated and, indeed, has worsened." *Order* at 1. Indeed, in June, 1987 the projected September backlog was estimated at 578 cases. *In* Re *Order On Prosecution* ***Of*** *Criminal* ***Appeals*** *By The Tenth Circuit Public Defender* ***And*** *By* ***Other*** *Public Defenders,* 523 So.2d 1149 (Fla. 2d DCA 1987). When the issue arose earlier in 1987, the estimated backlog was in excess of 400 cases. *En Banc I.* When the 2DCA denied the PDO's motion the previous year, the office was seeking to withdraw from 247 appeals. *Haggins* **v.** *State,* 498 So.2d 953 (Fla. 2d DCA 1986).

In addition to tolerating the lack of representation and delays indicated above, the 2DCA dismissed the cases of indigent appellants for reasons over which they had no control, which dismissals were themselves deprivations of appellants' fundamental rights. ***See Order Dismissing Criminal Appeals,*** **518** So.2d 403 (Fla. 2d DCA **1988).**

As the 2DCA recognized, the backlog of appeals results in the denial of fundamental constitutional rights, which it had both the duty and the inherent authority to protect. ***Order*** at ***3, 5.*** The backlog creates a continuing conflict of interest and denies the constitutional rights of access to courts, effective assistance of counsel on appeal, due process, and equal protection.

The vast majority of PD clients are imprisoned during the pendency of their appeals. The delay means that they serve their sentences before the Florida courts can review their cases on appeal, thus effectively thwarting their right to appellate review of their convictions and sentences, and to redress of those which are improper.[6] See § 924.06(1), Fla. Stat. **(1989).**

Since the entry of the Order, no work has been done on any 2DCA defender appeal outside the tenth circuit. A new backlog is rapidly being created, and is currently estimated at several

[6] In the Third District, an estimated 15% of PD clients served their sentences before briefs were filed or the court disposed of their cases. The situation in the Second District is even more offensive. The 10thCir-PDO does no work on any case involving a sentence of less than five years.

hundred cases above the **1,005** referred to in the Order. Additionally, there has been a failure to request supersedeas or habeas corpus relief for those who remain in custody while their appeals are being neglected.

The legislature has failed to adequately fund the appellate defenders. *Order* at **2**, 11. *See also* Br. of Fla. Ass'n of Counties at 1, and Charl. Co. at 11. Thus, while the counties say that the 2DCA's order is unprecedented, the Florida courts have frequently had to respond to similar defender caseload problems, and have done so in a similar manner. The Supreme Court of Florida and the First District have permitted or ordered four of the five appellate defenders not to accept new cases, to withdraw from existing cases, or to comply with briefing schedules imposed by the courts. ***E.g.,*** *In Re: Directive to the Public Defender of the Seventh Judicial Circuit,* **6** FLW **324** (Fla. **1981)**(*"Directive 7thCir-PDO"*); *In Re: Directive to the Public Defender of the Eleventh Judicial Circuit, 6* FLW **328** (Fla. **1981)** (*"Directive 11thCir-PDO"*); *In Re: Directive to the Public Defender of the Fifteenth Judicial Circuit, 6* FLW **327** (Fla. **1981)**(*"Directive 15thCir-PDO"*). The courts have also established briefing schedules or remanded cases to the trial courts for the appointment of attorneys consistent with section **27.53(3),** Florida Statutes. ***E.g.,*** *Directive 7thCir-PDO; Directive 11thCir-PDO; Directive 15thCir-PDO; Baker v. Dade County,* **384** So.2d **147** (Fla. **1980**); *Kiernan v. State,* **485** So.2d **460** (Fla. 1st DCA **1986**); *Grube v. State,* **529** So.2d **789** (Fla. 1st DCA **1988**); *Terry v. State,* **547** So.2d **712** (Fla. 1st DCA **1989**). Florida courts have

also ordered or permitted several trial defenders to withdraw from trials and appeals. *E.g., Escambia County* v. *Behr,* 384 So.2d 147 (Fla. 1980); *Kiernan; Schwarz* v. *Cianca,* 495 So.2d 1208 (Fla. 4th DCA 1986).

Accordingly, the 2DCA was correct in invoking its inherent power to address this problem. However, the power was exercised without due regard for its own limitations or those imposed by the doctrine of separation of powers, due process and equal protection.

The 2DCA's order does not solve the problem. That remains the challenge for this Court.

B. THE COURTS HAVE THE DUTY AS WELL AS THE INHERENT AUTHORITY TO REMEDY THE WHOLESALE DENIAL OF THE CONSTITUTIONAL RIGHTS OF ACCESS TO COURTS, EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, DUE PROCESS, AND EQUAL PROTECTION.

The record reflects undue delay in the processing of appeals, which violates the constitutional rights of access to courts, effective assistance of counsel, due process of law, and equal protection.

The state has an affirmative obligation under both the federal and state constitutions to ensure that indigent criminal defendants have adequate, effective, and meaningful access to the courts. *Bounds* v. *Smith,* 430 U.S. 817, 821-24 (1977); *Florida Bar* v. *Brumbaugh,* 355 So.2d 1186, 1192 (Fla. 1978). All three proscriptions expressly reflected in Article I, Section 21 of the Florida Constitution are implicated here:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This fundamental constitutional right ensures access to all courts, without regard to the type of petition or relief sought. *Hooks v. Wainwright,* 352 F. Supp. 163 (M.D. Fla. 1972). It encompasses, not only access to trial courts, but access for the purpose of appeals, petitions for habeas corpus, and civil rights actions. *See Bounds,* 430 U.S. at 827-828; *Griffin v. Illinois,* 351 U.S. 12 (1956); *Douglas v. California,* 372 U.S. 353 (1963).

State action, including court action or inaction, which delays prosecution of an appeal, violates the right of access to courts. *See Ryland v. Shapiro,* 708 F.2d 967, 972 (5th Cir. 1983); *Crews v. Petroski,* 509 F. Supp. 1199 (W.D. Pa. 1981); Art. I, § 21, Fla. Const.

Moreover, undue delay in the processing of an appeal is in itself a due process violation. *Burkett* v. *Cunningham,* 826 F.2d 1208, 1221 (3d Cir. 1987); *United States v. Johnson,* 732 F.2d 379, 381 (4th Cir. 1984), *cert. denied,* 469 U.S. 1033 (1984); *Rheuark v. Shaw,* 628 F.2d 297, 302-3 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981); *Simmons v. Reynolds,* 708 F. Supp. 505 (E.D. N.Y. 1989). Such delay violates due process and gives rise to a federal civil rights claim even if the appeal is eventually heard and the conviction affirmed. *Simmons v. Reynolds* at 510-11. Where, as here, the delay is so extreme as to assume constitutional proportions, discharge may be the appropriate remedy. *Burkett v. Cunningham* at 1222.

Due process also requires that a criminal defendant be given effective assistance of counsel on an appeal as of right. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985). "[N]ominal representation on

an appeal as of right--like nominal representation at trial--does not suffice to render the proceedings constitutionally adequate: a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Id.

The legal representation on the appeals in question is less than nominal.[7] The judicial processing of these cases also fails to meet constitutional standards.

The facts available to this Court make clear that indigent criminal appellants in the 2DCA do not receive meaningful access to courts while those who can pay do. Additionally, indigent criminal defendants who must rely on the 10thCir-PDO do not receive equal services in that: 1) the PDO must choose which among its clients it will serve, and 2) those whose cases are handled by other appellate defenders, such as the Seventh Circuit or Fifteenth Circuit PDOs, are not subject to similar deprivations. These distinctions are invidious and constitute denials of equal protection of the laws. *Douglas v. California; Griffin v. Illinois.*

The ultimate responsibility for protecting constitutional rights rests with the courts. *Dade County Classroom Teachers*

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[7]Where a defendant has no counsel, or only nominal counsel, the *Strickland v. Washington* two-prong test (requiring a showing that counsel was deficient and a showing of prejudice) does not apply. *Jenkins v. Coombe*, 821 F.2d 158, 161 (2d Cir. 1987). Where counsel is shown to have a conflict of interest which adversely affects his representation, prejudice is presumed. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

Ass'n v. Legislature, 269 So.2d 684, 686 (Fla. 1972). The courts have both the affirmative duty and the inherent authority to ensure access to courts and effective assistance of counsel, despite legislative inaction. ***See Makemson*** v. ***Martin County,*** 491 So.2d 1109 (Fla. 1986); ***Florida Bar*** v. ***Brumbaugh*** at 1192; ***Rose*** v. ***Palm Beach County,*** 361 So.2d 135, 137 (Fla. 1978); ***Satz*** v. ***Perlmutter,*** 379 So.2d 359, 360 (Fla. 1980)(legislative inaction cannot serve to close the doors of the state's courtrooms to its citizens who assert cognizable constitutional rights); ***McDaniel*** v. ***State,*** 219 So.2d 421 (Fla. 1969)(when orderly appellate review has been rendered unavailable and appeal has not been afforded, Supreme Court may take steps to prevent deprivation of due process).

As this Court stated in ***Rose:***

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.

Id. at 137 (footnotes omitted).

Legislative inaction which constitutes a threat to the integrity of the judicial process is at the root of this litigation. As the 2DCA and the petitioner-counties have noted,

legislative failure to fund the PDs is at the heart of the problem that the 2DCA has attempted to address.

Inherent judicial power clearly encompasses four areas: "the incidents of litigation, control of the court's process and procedure, control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings." *Petition* of *Florida Bar,* **61** So.2d **646, 647** (Fla. 1952). All four of these elements in the integrity of the judicial process support the entry of the Order by the 2DCA.

The Florida courts have invoked inherent judicial power to address defender caseload problems similar to that which now exists in the 2DCA. This Court and other Florida courts have directed public defenders not to accept new cases until they could effectively handle those they were already responsible for or to withdraw from existing cases. *See, e.g., Directive 7thCir-PDO; Directive 11thCir-PDO; Directive 15thCir-PDO.* The courts have also established briefing schedules or remanded cases to the trial courts for the appointment of attorneys consistent with section 27.53(3), Florida Statutes. *See, e.g., Directive 7thCir-PDO; Directive 11thCir-PDO; Directive 15thCir-PDO; Kiernan; Grube; Terry. See also Rose* (right to compulsory process); *White v. **Board of** County Commissioners **of** Pinellas County,* 537 So.2d **1376** (Fla. 1989)(right to effective assistance of counsel); *Makemson v. Martin County* (same).

The Florida and federal courts have protected prisoners' rights of access to courts, timely appeals, and effective assistance of appellate counsel by using their power to grant

habeas corpus and other relief. *See, e.g., State* v. *Meyer,* 430 So.2d 440 (Fla. 1983)(approving grant of habeas corpus relief where appellate counsel was ineffective as a matter of law); *Bell* v. *State,* 281 So.2d 361 (Fla. 2d DCA 1973)(vacating court order which violated right of access to courts by requiring that before matter of supersedeas bond was considered indigent defendant meet condition with which he was financially unable to comply): *Bounds,* 430 U.S. at 828 (fundamental constitutional right of access to the courts encompasses habeas corpus and civil rights actions, and requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law); *Jenkins* v. *Coombe*, 821 F.2d 158, 161 (2d Cir. 1987)(it was constitutional error for state appellate court to entertain defendant's appeal without providing him with effective appellate counsel; writ of habeas corpus would be granted if state court did not appoint appellate counsel and allow the prosecution of a new appeal).

State and federal courts have set aside convictions and released prisoners because of excessive delay in the appellate process. *Burkett* v. *Cunningham; People* ***of*** *Territory* ***of*** *Guam* v. *Olsen*, 462 F. Supp. 608 (D. Guam 1978); *State* v. *Files,* 441 A.2d 27 (Conn. 1981).

Currently, one state and one federal case have arisen regarding the problems in the 2DCA: *Hatten* v. *State,* #74,694, a mandamus proceeding pending in the Supreme Court of Florida, and *Yanke* v. *Polk County,* #88-878-Civ-T-17-C, a civil rights action

filed in the United States District Court for the Middle District of Florida.

C. THE SECOND DISTRICT'S ORDER EXCEEDS THE LIMITS UPON THE EXERCISE OF INHERENT JUDICIAL POWER.

The inherent authority of courts must be exercised with due regard for the limitations which stem from its nature as an implied power and for the limitations imposed by the doctrine of separation of powers. *Rose* at 138.

Inherent judicial power stems from the constitutional or statutory provisions creating the courts and clothing them with jurisdiction. *Petition of Florida Bar* at 647. A court has power to do anything reasonably necessary to administer justice within the scope of its jurisdiction, but not otherwise. *Petition of Florida Bar* at 647; *Rose* at 137.

Because it is the judiciary which ultimately determines the extent of its own inherent power, that power should be invoked only in situations of clear necessity, and then only after established methods and statutory procedures have failed. *See Rose* at 138. Particularly when seeking solutions to problems that have not been resolved or provided for by the legislature, the courts must use extreme caution to avoid invading areas of responsibility confided to the other two branches. *Rose* at 138. *Accord Makemson* at 1113.

Moreover, when exercising their inherent power, courts should not act unilaterally. *Chief Judge of the Eighth Judicial Circuit v. Board of County Commissioners,* 401 So.2d 1330 (Fla. 1981). When it is not possible to amicably resolve differences between co-equal branches of government, the court may exercise

inherent power, but must give those affected a hearing. Id. If an evidentiary hearing is requested, it must be held before an impartial judicial officer. Id.

Here, although the doctrine of inherent power was properly invoked by the 2DCA to protect the rights of criminal appellants, the power was not properly exercised. The extraordinary measures imposed by the 2DCA cannot be justified on the basis of inherent judicial power, because they unnecessarily conflict with established methods and statutory procedures and were imposed unilaterally.

D. THE ORDER UNNECESSARILY CONFLICTS WITH ESTABLISHED METHODS AND STATUTORY PROCEDURES.

Inherent power should be invoked only when the court has exhausted established methods and statutory procedures. *Rose* v. Palm *Beach County* at 138.

The Order directly and unnecessarily conflicts with established procedures and at least four provisions of the Florida Statutes: § 27.51(4)(b), regarding designation of the appellate defender; § 27.53(3), regarding circuit judges' discretion to appoint private attorneys; and §§ 27.51(6) and 27.53(4), regarding funding of the PDs.[8]

Section 27.51(4)(b) explicitly mandates that the 10thCir-PDO shall handle all felony apppeals to the state courts when requested to do so by a trial defender in the 2DCA. Thus, the

[8]See Argument I, Section B above regarding the conflict with statutory language relating to funding.

Order abrogates the right of the trial defenders to designate that office to handle those appeals.

Section 27.53(3), relating to conflicts, provides that circuit judges have the discretion to appoint private counsel when a PD has a conflict. The Order correctly notes that overload creates a conflict. *Order* at 2. This statutory discretion has been recognized in *Escambia County* v. *Behr* (within the "sound discretion" of trial court to appoint private counsel for appeal), and *Terry* v. *State* (directing trial court to appoint private counsel rather than trial PD would unreasonably restrict the discretion of the circuit courts). *See also Babb* v. *Edwards,* at 862; *Wilson* v. *Wainwright,* 474 So.2d 1162, 1164 (Fla. 1985). The Order directly and unnecessarily restricts that discretion.

Additionally, the Order contravenes the plain language of section 27.53(3), which explicitly becomes operative on the motion of a PD or a trial court's own motion. This section may not be intended to apply to appeals at all or to this type of conflict situation. Assuming *arguendo* that the section were applicable, the 2DCA could not use it to impose appellate duties on trial defenders.

By transferring responsibility for new appeals from the appellate PD designated by the legislature to trial defenders, the court shifted the problem from an underfunded PDO to offices which are not funded to handle appeals at all, and inadequately funded to handle their trial responsibilities. This "solves" one attorney's conflict of interest by transferring it to other attorneys. The indigent defendant is no better off. In fact, he

is probably worse off. Trial PDOs have virtually no appellate expertise, i.e., no appellate attorneys, support staff, or facilities such as adequate libraries. *See Kiernan* at 461.

As noted by Judge Schoonover, the order attempts to solve the problems of one PD by relieving him of his statutory duties and leaving the other PDs in the district to handle appeals for which they are "neither equipped nor funded." *Order* at 7.

Even though the Order anticipates that the trial PDs will be permitted to withdraw from the appeals, it requires them to file numerous motions and have hearings in numerous circuit courts sitting throughout each circuit in order to do so.

The 2DCA knew or should have known that the trial PDOs would demonstrate sufficient grounds for relief pursuant to the Order. It had previously determined that only the appellate circuits designated in the Florida Statutes are funded to any degree to handle indigent appeals; the trial circuits are not funded or staffed to do so. *En Banc I* at 1352. *See also Kiernan*. The counties correctly predict that the trial defenders will be permitted to withdraw from the 10thCir-PDO appeals. The Order flies in the face of *Wilson* v. *Wainwright,* in which this Court inveighed against the "perfunctory appointment of [appellate] counsel". *Id.* at 1164-65. In fact, no trial PDO has been required to handle an appeal pursuant to the Order.

The Order takes a similar approach to that taken when the 2DCA refused to appoint substitute counsel in *Haggins,* and suffers from a similar lack of effectiveness. The Order creates unnecessary and unacceptable delay by directing that the trial

PDs be appointed, rather than leaving the matter to the sound discretion of the circuit courts.

E. IN PROMULGATING THE ORDER, THE SECOND DISTRICT ABUSED ITS INHERENT POWER BY ACTING UNILATERALLY.

When exercising inherent power, the courts should not operate unilaterally. When it is not possible to amicably resolve differences between co-equal branches of government, the court may exercise inherent power but must give those affected a hearing. If an evidentiary hearing is requested, it must be held before an impartial judicial officer. ***Chief Judge*** of ***the Eighth Judicial Circuit v. Board of County Commissioners.***

Not only did the Order unduly interfere with the established methods and statutory procedures regarding PDs and circuit judges referred to above, it also indicates that the counties must provide compensation for any private counsel that the circuit courts might appoint. ***Order*** at ***3.*** The FPDA agrees with Judge Parker that the counties may have a due process right to be heard before a mandate of this magnitude is issued. Order at 12-13.

However, the FPDA position is that a court may appoint private counsel without the participation of the entity responsible by operation of law for paying counsel's fee, whether that entity be the state or the county. The only question for this Court to decide regarding the counties is whether the 2DCA properly determined that they were responsible for compensating the court appointed attorneys under Florida law.

Escambia County v. Behr, which authorizes Florida courts to appoint attorneys in indigent appeals to be paid by the counties,

held that the counties have no standing to be heard. *Id.* at 150. While, as the dissenters have noted, some supporting statutory language has been modified, *Order* at 7-8, 13, the statute's meaning and effect remain the same. *Behr* is still valid in regard to county standing. *Terry* at 713 (rejecting state's request that the counties have an opportunity to be heard).

Even if the counties are entitled to be heard, the Order affords them that opportunity in the circuit courts, when the trial PDs move to withdraw and the cost of compensating court appointed attorneys is incurred. But *see Terry.* Justice England, concurring in *Behr,* thought that the counties were the real parties in interest and should be heard regarding the claim of excessive PD caseload. *Id.* at 150. However, this litigation presents no question relating to the excessive nature or status of the 10thCir-PDO's appellate caseload.

F. WHO SHOULD PAY? STATE VERSUS COUNTY RESPONSIBILITY FOR COMPENSATING COURT APPOINTED ATTORNEYS.

Relying on § 925.036(2), the 2DCA decided that the counties are responsible for compensating attorneys appointed by the circuit courts upon the withdrawal of the trial PDs. *Order* at 3. However, as the dissenters note, there may be an argument that the county obligation is not clear. The section relied upon by the 2DCA is designated in § 27.53(3) as the basis for payment of court appointed counsel. Both of these sections are silent as to whether the state or county should pay.

The FPDA, by resolution, has taken the position that the state, rather than the counties, should be responsible for full

funding of Article V costs. Part of the rationale for requiring the state to compensate court appointed attorneys in this case is that the costs arise directly from a failure of the state to adequately fund the PDOs, which are constitutional and statutory agencies of the state. This rationale appears to have been adopted by at least one circuit court decision finding the state responsible for approximately 20 court-appointment cases. *State* v. *Nathaniel Frederick* (20th Cir., Charlotte Co., #88-568/570/89-1875 10/27/89)(Elmer O. Friday, J.).

Contrary to the counties' position, court appointed counsel are not employees of the PDOs. *See* Br. Hillsb. Co. at 16-19. Florida Statutes section 27.53(3)(a) provides that court appointed counsel should in no way be affiliated with the PD. *See Babb* V. *Edwards* at 862. Thus, as applied to conflict cases, the concept of "special assistant public defender positions" in a PDO is an oxymoron. *See* Br. Charl. Co. at 32.

Payment of court appointed counsel fees in conflict cases does not consitute a contribution to the PDO. Nor does the Order create "Special Assistant Public Defender positions" or make any reference to positions, whether in a PDO or otherwise. *See* Br. Hillsb. Co. at 16-19. The position of the counties is also inconsistent with the overload conflict reimbursement statute, § 925.037 (1989), which makes such payment a county responsibility independent of the PDOs.

While the FPDA recognizes the moral responsibility of the state, it cannot ignore the legal conclusion that the counties are subdivisions of the state and are not insulated from

responsibilities delegated to them by the state. The 2DCA may be right for the wrong reasons: Certain other statutes and decisions indicate county responsibility for court appointed attorneys' compensation.

In *In Interest* of *D. B.*, **385** So.2d **83** (Fla. **1980),** this Court interpreted § **43.28,** which mandates that, unless provided by the state, the counties shall provide personnel necessary to operate the circuit and county courts. This Court applied that section to attorneys whose appointment is constitutionally required, and held the county responsible. *D. B.* at **93.** *See also Brevard County Commissioners* v. *Moxley,* **526** So.2d **1023** (Fla. 5th DCA **1988).**

In two other cases, this Court has indicated that the counties are responsible. In *Baker* v. *Dade County,* the Court held the county responsible for compensating appointed attorneys to handle a PD's excessive appellate caseload. Although the statutory language has been modified, its meaning and effect have not. *Terry.* In **1986,** in *Makemson,* the Court permitted an increase in appointed attorneys' fees beyond the limits set in chapter **925,** and placed the additional burden on the counties. The issue of the county's basic liability for compensation was not raised.

Two subsections of Florida Statutes section **925.037,** regarding overload conflict reimbursement, and related language from Florida's FY **1989-90** Appropriations Act are particularly relevant. Subsection (8) is explicit: It provides that the funds allocated by the state to reimburse the counties for

overload conflict expenses are not to be construed as an appropriation, and that "[o]nce the allocation to the county has been expended, any further obligation under s. 27.53(3) shall continue to be the responsibility of the county pursuant to this chapter." Subsection (5) implies county responsibility, requiring them to report their expenditures for counsel appointed because of a stated lack of resources on the part of the public defender.

The legislative proviso language in this year's General Appropriations Act regarding reimbursement of the counties pursuant to § 925.037 provides: "Upon depletion of the funds allocated for this purpose, the responsibility for payment of conflict cases shall be that of each respective county." Laws of Fla. 89-253.

Thus, the cases and statutes affirm the position taken by the Order, and negate that taken by the counties with regard to their obligation to compensate court appointed counsel.

III.

THIS COURT SHOULD REMEDY THE SITUATION REFLECTED IN THE RECORD, TAKE JUDICIAL NOTICE OF THE SITUATION BEYOND THE SECOND DISTRICT, AND ESTABLISH A STATEWIDE PROCEDURE FOR DEALING WITH DEFENDER TRIAL AND APPELLATE OVERLOAD AND LACK OF RESOURCES.

A. THE PROBLEM OF DEFENDER OVERLOAD AT TRIAL AND ON APPEAL IS CHRONIC AND STATE-WIDE.

The problem faced by the 2DCA was identical to that faced by trial and appellate courts across the state for many years. The Supreme Court of Florida and the district courts of appeal have

had similar problems with each of the five appellate PDOs. Florida courts have also ordered or permitted at least six of the trial PDOs to withdraw from trials or appeals.[9]

Responses By The Supreme Court of Florida

In 1981, the Supreme Court of Florida entered orders to show cause against the PDs of three judicial circuits because of excessive delay in filing briefs in capital appeals. The Court ordered the PDs to comply with briefing schedules in certain cases, withdraw from others, and not accept any new capital appeals until they could assure the Court that the cases could be handled in a timely manner. *See Directive 7thCir-PDO; Directive 11thCir-PDO; Directive 15thCir-PDO.*

The 7thCir-PDO accepted no new capital appeals for one year after the entry of the directive, and has limited intake since that time. The 11thCir-PDO has accepted only two new capital appellants since 1981. The 15thCir-PDO accepted no new capital appeals for six years, at which point the Court rescinded the directive.

In 1987, the Supreme Court began establishing briefing schedules for the 10thCir-PDO's capital appeals. The PD's

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[9]This Court may take judicial notice of the statewide problem of excessive PD caseload, *see Foxworth* v. *Wainwright,* 167 So.2d 868, 870 (Fla. 1964)(Court may take judicial notice of its own records); *Airvac, Inc.* v. *Ranger Insurance Co.,* 330 So.2d 467, 469 (Fla. 1976)(Court may take judicial notice of the opinions and record in related proceedings). *See also In re Rouse,* 66 So.2d 42, 44 (Fla. 1953)(Court took judicial notice of large volume of divorce cases heard by circuit judges in Dade and other large counties, and of fact that custody and support of children was involved in a large proportion of those cases).

request was based on his inability to cope with this workload, and on the one-year delays in the processing of those cases. The original briefing schedule expired in June **1989**. The Supreme Court approved a new briefing schedule in August **1989**, and has repeatedly revised and extended that schedule with great reluctance.

In July **1989**, the 2dCir-PDO requested that this Court establish a briefing schedule because the PDO was unable to file its capital briefs within the normal 30 to 60 day extension. The Court established a briefing schedule for three cases and has been granting longer extensions as the situation of the PDO has worsened. Recently, the extensions have been for over four months. *Frazier* v. *State* (Fla. **#74,943**); *Wike* v. *State* (Fla. #74,722).

In **1980**, this Court affirmed a circuit court order permitting the 11thCir-PDO to withdraw from certain appeals because of excessive caseload. *Baker* v. *Dade County*. At the same time, the Court affirmed the granting of a motion to withdraw from a number of felony cases by the 1stCir-PDO. *Escambia* County v. *Behr*.

Responses By The District **Courts of Appeal**

Appellate defenders have continually had problems coping with their caseloads in the district courts and have had to withdraw from appeals. Of the five district courts of appeal, three have had serious problems with non-capital appeals reflected in their opinions. In addition to the 2DCA, whose history with regard to indigent appeals from the 10thCir-PDO is a

matter of record before this Court and has been discussed above, at argument II section A, the First and Third Districts have had such problems involving the Second and Eleventh Circuit PDOs.

During the last several years, the First District has had to respond to at least three requests for assistance by the 2dCir-PDO, due to its inability to handle its excessive appellate caseload. The PDO filed motions to establish briefing schedules and for authorization to withdraw in three groups of cases. The court has granted relief and agreed to consider motions to withdraw in up to 100 cases in each of the first two groups. *See Grube; Kiernan. See also* ***Crow*** V. *State, 500* So.2d **171** (Fla. 1st **DCA 1986).** In June **1989,** the 2dCir-PDO filed the third group of such motions in 150 cases. These motions were consolidated and granted. *Terry.* The court has expressly noted the "dedication and diligence" of the 2dCir-PDO. *Grube* at **790.**

In **1980,** as a result of Baker V. Dade *County,* the PD, in cooperation with the Chief Judge of the Eleventh Judicial Circuit and Dade County, instituted the "Baker Program" to alleviate the appellate backlog. Under this program, the PD appoints special assistant public defenders to handle appeals. Since **1980,** approximately 100 cases have been handled in this program each year, at an annual cost to Dade County of approximately $100,000, a total of about $1,000,000.

Despite the availability of the Baker program and other external support, the 11thCir-PDO has not been able to adequately fulfill its appellate obligations. In the Third District, virtually no PD brief is filed within the time limits established

by the rules of appellate procedure; almost every one is filed after numerous extensions of time. The court has repeatedly, explicitly admonished the PDO for delays in filing briefs. *See Johnson* v. *State*, 501 So.2d 158, 161 n. 7 (Fla. 3d DCA 1987); *Cobb* v. *State*, 511 So.2d 698, 700 n. 3 (Fla. 3d DCA 1987); *Thomas* v. *State*, 526 So.2d 183, 184 n. 1 (Fla. 3d DCA 1988).

In *Marshall* v. *State* (Fla. 3d DCA #85-165 4/13/88), the Third District ordered the PD to inform the court "why he permits delays in the filing of briefs on behalf of his clients for excessive periods and to suggest means of correcting that situation". For many years, that court has engaged in the practice of granting extensions of time for the filing of briefs for a period of 180 days, dismissing cases in which briefs have not been filed, and reinstating those cases when briefs are filed. *See Johnson, Cobb,* and *Thomas.* It is estimated that, since the inception of this practice, the Third District has dismissed one quarter of all of the appeals processed by the PDO. Since January, 1981, the court has dismissed approximately 1,400 appeals. This practice is as invidious as that in the Second District, and violates the same fundamental rights.

The Fourth District has also granted a PD relief from an excessive trial workload. In 1986, the court granted extraordinary relief to the 19thCir-PDO and permitted that office to withdraw from certain pending misdemeanor, juvenile, and mental health cases, as well as all such cases filed during the remainder of the year. *Schwarz* v. *Cianca.*

Responses By The Trial Courts

The counties do not have to be prescient to correctly predict that the trial defenders will be permitted to withdraw by the circuit judges under the Order. *See* Br. Hillsb. Co. at 20. In situations which parallel this one, trial defender offices as well as trial courts have had to deal with the consequences of excessive appellate defender caseload.

In *Kiernan*, the 8thCir-PDO moved to withdraw from appeals to which the circuit court had assigned it when the appellate defender was permitted by the First District to withdraw due to overload. The 8thCir-PDO requested leave to withdraw in the First District, stating that because it was a trial office it had not been funded to represent indigent appellants, faced an excessive trial caseload, and that its attorneys were trained in trial rather than appellate practice and had virtually no appellate experience. The First District granted the motion and remanded the cases to the circuit court for the appointment of alternative counsel.

The 2DCA by its Order has involved five trial defenders in the process of shifting an appellate defender's excessive caseload to court-appointed private attorneys. *Order* at 5-6. To date, none of the trial defenders has been assigned an appeal by a circuit court.

In 1977, the circuit court granted the 11thCir-PDO leave to withdraw from certain appeals. That order was affirmed by this court in *Baker* v. *Dade County.*

The 11thCir-PDO chronically has been unable to fulfill its

obligations in the trial courts. The office has withdrawn from representation in branch county courts, and has been unable to staff a calendar in the central county court. It has temporarily ceased accepting capital cases in several felony courtrooms for approximately two months, and been unable to staff newly-created felony courtrooms. In 1989, in an effort to assist the PDO in fulfilling its obligations in the trial courts, the Chief Judge appointed thirteen attorneys as special assistant public defenders and assigned them to trial responsibilities under the supervision of the PD. The annual cost to Dade County is $390,000. Since then, the Chief Judge has authorized the appointment of an additional twenty-one special assistant public defenders. The annual cost to Dade County is an additional $720,000.

Three PDOs, in the 9th, 2d, and 13th circuits, have recently found it impossible to cope with their felony caseloads. In 1989, the 9thCir-PDO, began to withdraw from selected difficult, complex, and serious cases in Orange County, and anticipates that it will be necessary to withdraw from cases in Osceola County and misdemeanor cases in the near future. In 1988, the 2dCir-PDO withdrew from approximately 80 felony cases. Since 1985, Hillsborough County has been providing personnel in order to help the 13thCir-PDO cope with its trial responsibilities. By 1988, that support had increased to 12 positions, costing the county more than $300,000 per year.

In 1977, the circuit court granted the 1stCir-PDO's motion to withdraw in a number of felony cases. That order was affirmed

by this Court. *Escambia* County v. Behr. The 1stCir-PDO is likely to have to withdraw from felony cases again in **1990.**

Current Defender Caseloads Are Egregiously Excessive.

The 800 attorneys in the PDOs were responsible for more than 460,000 cases after arraignment in our state's trial and appellate courts during **1989.** The following are current examples of trial caseloads per attorney per year.

Misdemeanors--The FPDA maximum standard is **400.**

About 1200	Miami and Tallahassee
About 1000	Key West, Jacksonville & Pensacola
About 870	Tampa

Non-capital Felonies--The FPDA maximum standard is ***200.***

About **380**	Tampa & Jacksonville
360	Tallahassee
About **335**	Miami
About **325**	Key West

Juvenile and Mental Health--The FPDA maximum standard is **250.**

About 600	Tampa & Jacksonville
840	Pensacola
520	West Palm Beach

The FPDA maximum caseload standards require more work per attorney-year than comparable national standards. Thus, caseloads of two to three times the FPDA standards are egregiously excessive.

B. **THE PROBLEM OF LACK OF RESOURCES AT TRIAL AND ON APPEAL IS CHRONIC AND STATEWIDE.**

Besides the lack of an effective, uniform procedure for addressing excessive defender caseload, as Charlotte County has noted, the heart of the issue here is the failure of the legislature to adequately fund all Florida public defenders. Br.

Charl. Co. at 11. Public defenders across the State of Florida have been provided with a smaller fraction of their needs in each of the last several years. The problem of serious underfunding and understaffing exists in nearly all of our state's PDOs.

The highest level at which the defenders have been funded statewide was 73% of need, as calculated according to the FPDA funding formula, in 1984. See § 27.53(4), Fla. Stat. Funding has rapidly declined from that point to 47% of need, in 1989.

In terms of funds appropriated to the PDs by the state, the average cost per case in FY 1988-89 was $170 statewide. This figure represents a marked decrease from the $218 cost per case in FY 1983-84. The number of cases used for purposes of this discussion has been audited by the state, and does not include the large numbers of prearraignment and probation violation matters also handled by the PDs.

When PD funding is compared with that of the state attorneys ("SAs"), it is clear that the PDs are not adequately funded. Each PDO's caseload is about 70% to 90% of its counterpart SAO. Additionally, PD caseloads include a higher percentage of serious cases, and a lower percentage of misdemeanors. Yet PDs received only 53% of the SAs' funds and only 48% of SAs' positions statewide in FY 1989-90.

PD overload is a problem of such magnitude that the legislature last year, for the first time, enacted a statute which allows the counties to be reimbursed with state funds for overload conflict cases. § 925.037, Fla. Stat. (1989). The appropriation for all conflicts, including overload conflicts, is

severely limited, amounting to only $2,000,000 statewide.

Professional and civic institutions have continued to express concern about the defender caseload problem. The Order adopts the conclusion and recommendation of the Judicial Council of Florida, which had twice studied the "problem of public defender appellate backlog statewide." Order at 2. The conclusion was that the "inability of appellate public defenders to cope with the massive number of appeals to which they are assigned results not from a lack of efficiency of the public defenders' offices, but a lack of funds appropriated to them. . . ." Id. The Council's recommendation was that "the public defenders, as presently constituted, be adequately funded by the legislature." Id. In January 1990, the Judicial Council passed a resolution noting PD trial as well as appellate workload problems, and encouraging the creation of a legislative commission to address those problems.

In an effort to develop solutions to the PDs' resources/workload situation, the Florida State University College of Law sponsored a symposium entitled "Gideon Undone: Criminal Justice and Indigent Defense In Crisis", in April, 1989. The advisory council for the symposium consisted of the chief justice of the Supreme Court of Florida; the general counsel to the governor; the dean of the law school: and a state senator, representative, and public defender. The president of the American Bar Association and the speaker of the Florida House of Representatives were among those who made presentations. The speaker told the assembled judges, public officials, and

academicians, with regard to public defender funding: "There isn't any money, and you are not going to get any."

In December, 1989, the Crime Prevention and Law Enforcement Study Commission issued its report recommending that "the Governor and Legislature recognize that Public Defender Offices are underfunded" and that "a substantial funding enhancement should be provided so that Florida will not find itself in violation of Federal Court mandates." *Master Planning For Florida's Criminal Justice System,* Crime Prevention and Law Enforcement Study Commission, January 1, 1990 at 84.

In a recent evaluation of the 11thCir-PDO, the National Center for State Courts concluded:

> The most serious problem observed by the project team while visiting the Dade County Public Defender's Office is case overload and lack of personnel resources to deal with the caseload. At 7. * * * A comparison of the caseload increase with the increase in staff from 1984 to 1989 shows that the number of new cases has increased at a faster rate than did staff increases. Caseload increased approximately 78% since 1983-84 (27,314 to 49,586) while the number of positions over this same period increased by only 30% (196 to 255). At 16.

Management Review of the Office of the Public Defender, 11th Judicial Circuit of Florida, Draft Final Report, Southeastern Regional Office, National Center For State Courts, January 1990.

Adequate state funds and personnel have not been allocated to indigent defense in the past, and it is extremely unlikely that adequate resources will be allocated in the future. Therefore, it is incumbent upon Florida's judiciary to effectively address the growing consequences of excessive PD workload, such as those reflected herein.

CONCLUSION

The 2DCA has recognized the existence of extremely serious deprivations of constitutional rights within its jurisdiction. Unfortunately, that court has inappropriately exercised its authority in its attempt to rectify that situation. It is essential that this Court settle certain issues presented here and fashion effective remedies to ensure the integrity of the judicial process. Wherefore, the Florida Public Defender Association respectfully recommends that this Court:

1. Recognize that the trial defenders and appellate defender in the 2DCA are in no position to handle the existing appellate backlog.

2. Appoint private counsel in sufficient numbers to address the needs of the affected appellants and to prevent the backlogs from growing.

- Appoint counsel for the 1,005 indigent appellants, plus those in the new backlog, or provide inmates with adequate law libraries or adequate assistance from persons trained in the law, in accordance with *Bounds*.

- Consider approving a program similar to the Baker program, relying on private practitioners as specially appointed assistant public defenders. These attorneys would be paid by the state or the counties as required by law. The trial PDs would continue to prepare the records on appeal and handle other matters up to writing the briefs, in order to reduce the costs.

- Consider the appointment of full-time special

assistant public defenders to handle the appellate overload, working in a PDO under the supervision of the designated appellate defender.

3. Grant supersedeas or habeas corpus relief, or remand with instructions to the **2DCA** to do **so,** *i.e.,* release permanently or on recognizance all inmates whose trials or appeals are unconstitutionally delayed by failure of the state to provide adequate resources to the public defenders, ineffective assistance of counsel, or failure of the courts to correct well known problems in the judicial process.

4. Adopt an effective, uniform statewide procedure to address the need of public defenders to withdraw from representation due to excessive trial and appellate workloads.

- This procedure should be similar to that employed by the Supreme Court of Florida in the *Directives* and the First District in *Terry* and *Kiernan,* and should reject the approach taken by the **2DCA** which involves the trial defenders in appeals.

- The procedure should reaffirm *Terry* and *Behr* to the effect that the entity responsible for compensating court appointed attorneys by operation of law does not have standing to be heard.

- Defender withdrawal from appeals should not be upon appointment, but upon the filing of the record on appeal. This will cause no delay, and will permit all defender offices to reduce the cost of court appointed counsel.

- The procedure should provide that no court need rule

on defender withdrawal from trials or appeals on a case-by-case basis, and that this matter is within a court's sound discretion.

- The procedure should permit an appellate court, as well as a trial court, to exercise discretion to appoint counsel upon public defender withdrawal from an appeal.

5. Determine whether the state or the county is responsible for compensating court appointed counsel in appellate overload cases, as well as others.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of amicus curia was delivered by mail to the following: John E. Schaefer, Sr. Assistant County Attorney, Pinellas County, 315 Court Street, Clearwater, Florida 34616; Elizabeth M. Woodford, Assistant County Attorney, Lee County, P.O. Box 398, Ft. Myers, Florida 33902; Kenneth B. Cuyler, County Attorney, Ramiro Manalich and Brenda C. Wilson, Assistant County Attorneys, Collier County, 3301 E. Tamiami Trail, Naples, Florida 33962; Fred B. Karl, County Attorney, and Bob Warchola, Assistant County Attorney, Hillsborough County, P.O. Box 1110, Tampa, Florida 33601; H. Hamilton Rice, Jr., County Attorney, and Paul G. Bangel, Assistant County Attorney, Manatee County, P.O. Box 1000, Bradenton, Florida 34206; Charles H. Webb, County Attorney, Charlotte County, 18500 Murdock Circle, Port Charlotte, Florida 33948-1094; The Honorable James Marion Moorman, Public Defender, Tenth Judicial Circuit of Florida, P.O. Box 9000, Bartow, Florida 33830; The Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301; Will J. Richardson, Esq., P.O. Box 1386, Tallahassee, Florida 32302; on this 5th day of March, 1990.

BENNETT H. BRUMMER